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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 254

WILLIAM THOMAS KLOPP, PETITIONER

v.

J. OVERLADE, WARDEN, UNITED STATES PENITENTIARY, TERRE HAUTE, INDIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 64–73) is reported at 66 F. Supp. 450. The opinions of the circuit court of appeals on the original hearing (R. 105–107) and on the petition for rehearing (Appendix, Pet. 26–27) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 27, 1946 (R. 107), and a petition for rehearing (R. 112–118) was denied July 3, 1947 (R. 118). The petition for a writ

of certiorari was filed August 11, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner was convicted of failing to report for work of national importance under civilian direction, in violation of the Selective Training and Service Act. The trial court erroneously refused to permit him to defend on the ground that his classification as a conscientious objector was arbitrary. He appealed to the appropriate circuit court of appeals, which affirmed his conviction, but he did not exhaust his appellate remedies by petitioning this Court for a writ of certiorari. The question presented is whether petitioner, under those circumstances, had standing to challenge his conviction by writ of habeas corpus.

STATEMENT

On February 13, 1946, petitioner filed in the District Court for the Southern District of Indiana a petition for a writ of habeas corpus alleging, in brief, that he was convicted in the District Court for the Southern District of Ohio on May 15, 1944, for failing to report to a civilian public service camp for work of national importance, as ordered by his selective service board, in violation of Section 11 of the Selective Training and Serv-

ice Act of 1940; that he was sentenced to imprisonment for five years; that the judgment of conviction was affirmed on March 26, 1945, by the Circuit Court of Appeals for the Sixth Circuit; but that the judgment of conviction was void because petitioner was illegally denied classification as a duly ordained minister of religion and because the convicting court denied him the opportunity to prove such denial in defense to the indictment (R. 6–30). A rule to show cause was issued (R. 32) and respondent filed an answer to the rule (R. 38–52). It was stipulated that "In event the court decides that a cause for issuance of the writ is alleged in the petition but that upon the evidence produced at the hearing the petitioner is not entitled to a discharge from custody, the court may decide the case as though the writ of habeas corpus had heretofore issued and enter an order remanding the petitioner and dismissing the petition" (R. 53–54, 96). A hearing was had on March 4, 1946 (R. 93–100). No oral testimony was introduced and it was stipulated that certain exhibits would constitute all the evidence in the case. These exhibits included petitioner's selective service file, the transcript of record of petitioner's criminal trial, and the opinion of Mr. Justice Reed refusing to admit petitioner to bail pending appeal from his conviction. (R. 97–98; see R. 49–52.)

On May 28, 1946, the district court entered findings of fact and conclusions of law adverse to

petitioner (R. 58–64), filed an accompanying memorandum opinion (R. 64–73), and ordered the writ discharged and petitioner remanded to custody (R. 73). On appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment of the district court was affirmed (R. 107). A petition for rehearing was denied (R. 118) on the authority of this Court's decision in *Sunal* v. *Large,* No. 535, Oct. Term 1946, decided June 23, 1947 (Appendix, Pet. 26–27).

The facts as found by the district court [1] may be summarized as follows:

Petitioner registered under the Selective Training and Service Act on October 16, 1940, with Local Board No. 4, Middletown, Ohio (R. 58, 65). In his selective service questionnaire, executed June 9, 1941, and filed June 12, 1941, he stated that he was "working as secretary-treasurer for the Reed-Klopp Company, retail furniture dealer, at Middletown, Ohio, doing the work of auditor, bookkeeper, paymaster, manager and proprietor-employer, hiring some 20 paid workers, at an average weekly earning of $180" (R. 65, 59). To the question as to what other business he was engaged in, he replied "minister," saying that he had been a minister since June 1940, but not formally ordained. He further stated that he was "a conscien-

[1] The petition for a writ of certiorari accepts the findings of fact by the district court as true for the purposes of the petition (Pet. 6).

tious objector to both combatant and noncombatant military service." (R. 65.)

On June 12, 1941, petitioner executed and filed with his local board a special form for conscientious objectors containing the following statement: "I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors because I am conscientiously opposed by reason of my religious training and belief to participation in war in any form and to participation in any service which is under the direction of military authorities" (R. 59).

On June 16, 1942, petitioner filed an occupational questionnaire. In it he stated that he "was then secretary-treasurer of the furniture store; that he had been employed therein for ten years, beginning in 1932, and that his duties were overseeing and assisting in bookkeeping, accounting, general office work, payroll handling and recording, and handling files, reports and claims." He added that the "work for which he was next best fitted was that of newspaper photography in which he had had three years experience; that he had worked as radio-repairman and in writing advertising for a retail furniture store." Among occupations for which he thought he might be qualified, he checked the words "accountant" and "administrative official." Under the heading "other professional or scientific occupation," he inserted the words "ministerial work." (R. 65.)

On October 12, 1942, petitioner filed an affidavit in respect of his financial status and dependents, and on September 3, 1943, he filed another affidavit of a similar nature. In each he claimed the dependency of a wife, a divorced wife, and two children by his divorced wife. In the former affidavit, he stated that he had earned $18,000 in the previous year as secretary-treasurer of his company. In the latter, he stated that he had earned $16,500 in the previous year in the same occupation and in operating a farm of 122 acres, and that his earnings at that time amounted to $250 per week. In neither affidavit did petitioner make reference to being a minister of religion. (R. 59, 65–66.)

After having been first classified, on June 16, 1941, in Class III–A because of his dependents, petitioner was reclassified, on November 15, 1943, in Class IV–E as a conscientious objector. He requested a personal conference with his local board and was advised to appear on November 29, 1943. (R. 59, 66.) At this conference, petitioner supplied the board with certificates of several members of Jehovah's Witnesses relative to his religious activities, certificates of others as to their opinion as to his status in the organization, and a letter from the Watchtower Bible and Tract Society indicating that he was then an "assistant company servant." He also supplied the board with a letter from his father, the president of

Reed-Klopp Company, stating that petitioner was "certainly a key man in our organization, as he has been employed regularly since July, 1928, is in charge of all financial operations and handles all of the many tax problems as well as the many regulations to which we are subjected." His absence, said his father, "would complicate and largely nullify our tax and regulation procedures." The letter further averred that it was possible, if petitioner was compelled to leave the store, that "its operation would have to be discontinued and the entire stock disposed of at auction or otherwise," and that "such an event would be a calamity to the community." The record of the board disclosed further that petitioner stated at the conference that he devoted 35 to 38 hours per week to the discharge of his duties with the furniture company and that he owned a farm which was operated by a hired man. (R. 66.)

On December 2, 1943, the board informed petitioner that after further consideration of his case since his personal appearance it had declined his request for reclassification to Class IV–D, as a minister of religion (R. 67). On December 10, 1943, petitioner appealed to the board of appeal having jurisdiction over his case, and on December 27, 1943, the board of appeal by unanimous vote affirmed his IV–E classification (R. 59–60). Petitioner's file was thereafter sent to state headquarters for examination, and that office returned

the file on January 15, 1944, setting forth the reasons which, in the opinion of that office, justified the local board in refusing to classify petitioner in Class IV–D (R. 67).

Petitioner thereafter passed a pre-induction physical examination, was found fit for general military service (but for the fact of his classification as a conscientious objector to such service), was assigned by the Director of Selective Service to work of national importance under civilian direction at a civilian public service camp, and was ordered by his local board to report to it on March 9, 1944, for transportation to the camp. He failed to report as directed. (R. 60.)

On April 21, 1944, petitioner was indicted by a grand jury in the Southern District of Ohio for having failed to perform a duty required of him under the Selective Training and Service Act, in that he failed to report as directed for transportation to the civilian public service camp. Petitioner was represented by counsel throughout the trial of this indictment. He attempted to introduce certain evidence which, he contended, would show that the local board acted arbitrarily and capriciously in refusing to classify him in Class IV–D as a minister of religion. The court excluded the proffered evidence and instructed the jury that the only issue was whether or not petitioner reported to the local board for "induction into an important war service under civilian direc-

tion." Petitioner was found guilty by jury verdict on May 15, 1944, and was sentenced to five years' imprisonment and to pay a fine of $3,500. (R. 60–61.)

Petitioner appealed his conviction to the Circuit Court of Appeals for the Sixth Circuit (R. 61). Having been denied bail pending appeal, he sought to be released on bail through an application to Mr. Justice Reed, as Circuit Justice. Following a hearing, Mr. Justice Reed denied bail on July 17, 1944. In an opinion which he filed with the clerk of the circuit court of appeals (R. 49–52), Mr. Justice Reed, in adverting to the merits of petitioner's classification, stated (R. 51–52):

> * * * Certainly the local board must decide whether a registrant is a minister This it has done. Conclusions as to status upon evidence and at a hearing, such as we have by this local board, are procedurally fair. * * *
>
> * * * From the evidence offered and refused at the trial, however, it is clear to me that the local board was justified in concluding that appellant was not a minister within the terms of the Selective Service Act. By far the greater part of his time was given to secular work. His responsibilities for Bible teaching, magazine subscriptions, back-calls and acting as substitute for the Company-Servant may be said to correspond more closely to that of lay readers, Sunday School teachers, deacon-

> esses or other church helpers in the more orthodox religious sects. Nothing which has been called to my attention justifies in my view a conclusion that the classification by the local board was arbitrary or beyond their statutory power.

The Circuit Court of Appeals for the Sixth Circuit affirmed petitioner's conviction on March 26, 1945 (R. 61), observing in its opinion that "Though earning more than $12,000 per year in a retail furniture business, he claimed exemption from all service as a regularly and duly ordained minister of religion of the sect Jehovah's Witnesses" (*Klopp* v. *United States,* 148 F. 2d 659). Petitioner did not apply to this Court for a writ of certiorari to review this judgment (R. 61).

ARGUMENT

This case is controlled, as the court below recognized in denying a petition for rehearing (Appendix, Pet. 26–27), by this Court's holding in *Sunal* v. *Large,* No. 535, Oct. T. 1946, decided June 23, 1947, to the effect that the writ of habeas corpus may not be employed as a substitute for appellate procedure to correct an error committed by the convicting court.[2] Petitioner attempts to

[2] Under the rule of *Estep* v. *United States*, 327 U. S. 114, decided after petitioner's conviction and the affirmance of his conviction on appeal (see also *Gibson* v. *United States*, 329 U. S. 338, 343–350), it was concededly error for the convicting court to refuse to permit petitioner to challenge his IV–E classification at his trial for failure to report for

distinguish this case from *Sunal* v. *Large*, however, on the ground that, whereas neither Sunal nor Kulick appealed his conviction, petitioner did appeal his conviction to the Circuit Court of Appeals for the Sixth Circuit and lost (Pet. 16). He relies on the following language of the opinion in *Sunal* v. *Large*:

> * * * Of course, if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile.

But petitioner did not exhaust his appellate remedies. He did not apply to this Court for a writ of certiorari to review the judgment affirming his conviction. That he was required to do at least this much before he could have any standing to attack his conviction by habeas corpus is clear from the following language of this Court, which immediately follows the above-quoted language:

> We are dealing here with a problem which has radiations far beyond the present cases. The courts which tried the de-

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work of national importance under civilian direction. In view, however, of the overwhelming evidence, summarized above (pp. 4–10), that this classification was not arbitrary and that petitioner's claim to exemption from all service as a minister of religion was baseless, the error, we think, was not prejudicial.

> fendants had jurisdiction over their persons and over the offense. They committed an error of law in excluding the defense which was tendered. That error did not go to the jurisdiction of the trial court. Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction. * * *

While petitioner initiated his appellate remedies, therefore, by appealing to the Circuit Court of Appeals for the Sixth Circuit, he plainly did not exhaust them. He had no standing, consequently, to challenge his conviction by writ of habeas corpus.

CONCLUSION

The case is governed in all respects by *Sunal* v. *Large,* decided at the last Term. We therefore respectfully submit that the present petition for certiorari should be denied.

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